Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MICHAEL FRANKLIN,
Petitioner,

v.

GREGORY SIMS, WARDEN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Seventh Circuit's decision conflict with *Batson v. Kentucky*, 476 U.S. 79 (1986), by affirming the summary denial of a defendant's *Batson* objection on the grounds that it was not unreasonable for state courts to rely primarily upon the presence of minority venirepersons on the jury as the basis for negating a *prima facie* inference of discrimination from the prosecution's unexplained exclusion of other minority venirepersons?

PARTIES TO THE PROCEEDING

The parties below were (1) Michael Franklin and (2) Gregory Sims, Warden, Taylorville Correctional Center, Taylorville, Illinois. The real party in interest is the State of Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Franklin asks this Court to issue a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit rejecting his claim that the jury that convicted him was selected in a manner violating the requirements of *Batson v. Kentucky*, 476 U.S. 89 (1986).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 538 F.3d 661 (7th Cir. Aug. 14, 2008), and is reprinted at App. A, 1a - 13a. The Court of Appeals affirmed a denial of Franklin's petition for habeas corpus by the United States District Court for the Northern District of Illinois. The District Court opinion is reprinted at App. B, 14a - 17a. The Illinois Appellate Court opinion is unpublished; relevant excerpts of the opinion and dissent discussing Franklin's *Batson* objection are reprinted at App. C, 18a - 43a.

JURISDICTION

On August 14, 2008, the Court of Appeals announced its decision affirming the District Court's denial of Petitioner's petition for a writ of habeas corpus. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Title 28, Section 2254 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF FACTS

Petitioner Michael Franklin was convicted of armed robbery after a jury trial in Illinois Circuit

Court and sentenced to 23 years in prison. During voir dire conducted on February 4, 2003, the trial court questioned dozens of prospective jurors individually. (App. D at 44a - 46a). Four African American venire persons were questioned: Margaret Cooley, Alma Minefe, Lance Tyson, and Dorothy Gandy. Each one stated that they could be fair and impartial and apply the law. (App. D at 50a - 51a, 53a - 54a, 55a, 57a - 59a, 63a, 65a).

The trial court called a panel of four prospective jurors into the jury box for peremptory strikes. (App. D at 66a). Ms. Cooley and Ms. Minefe were on the first panel. (*Id.*) The State's Attorney used his first peremptory strike against Ms. Cooley. (*Id.*) Mr. Tyson was then called to take Ms. Cooley's place as a prospective juror. (*Id.*) The State's Attorney used his next peremptory strike against Mr. Tyson. (*Id.*)

Franklin's counsel immediately objected on *Batson* grounds. (App. D at 67a) The trial court summarily denied this objection stating that Franklin had failed to demonstrate a "*prima facie* case of systematic exclusion." (App. D at 67a - 69a). The trial court observed that the panel tendered "contains one African American." (App. D at 68a.) This was the sole factual finding made by the trial judge, and the prosecution did not provide race-neutral reasons for its strikes. (*Id.*)

After two more peremptory strikes, the final African American venireperson, Dorothy Gandy, was selected. (App. D at 69a - 70a.) The trial judge stated: "[T]he record should reflect that the first panel is Minefe, Freels, Gandy and McVicker. I

believe there's four jurors, two are African American. Okay. That's your first panel." (App. D at 70a.).

The final selected jury consisted of twelve members, two of whom (Minefe and Gandy) were African American. (App. C at 27a). After his conviction, Franklin appealed to the Illinois Appellate Court, arguing that the State unconstitutionally exercised its peremptory strikes against two other African American venire persons in violation of the principles set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). On September 9, 2005, the Illinois Appellate Court affirmed.

The Illinois Appellate Court reviewed Franklin's *prima facie* claim by applying seven "relevant circumstances" identified by the Illinois Supreme Court. (App. C, at 25a - 29a, *citing People v. Williams*, 670 N.E.2d 638, 650 (Ill. 1996)). These seven "relevant circumstances" were: (1) the racial identity between the defendant and the excluded venire persons; (2) a pattern of strikes against African American venire persons; (3) a disproportionate use of peremptory strikes against African-American venire persons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venire persons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witness. (*Id.*)

Construing the record against Franklin, the Illinois Appellate Court found that there were four African Americans in the 36-person venire. (App. C at 26a.) The Illinois Appellate Court concluded that most of the *Williams* factors were neutral, in the sense that they did not affirmatively support or negate the Franklin's *prima facie* case. (App. C at 25a - 29a.) However, the court found the fourth *Williams* factor, the level of African-American representation in the venire as compared to the jury, weighed against Franklin's *Batson* claim. (App. C at 27a.) The court noted, "African-Americans constituted 16.7% of the jury, but only 11.2% of the entire venire." (*Id.*) The court held that "[t]hese numbers *belie* any claim of purposeful discrimination against African-Americans." (*Id.*) (emphasis added).

The District Court denied Franklin's petition for a writ of habeas corpus. (App. B at 14a - 17a.) The Seventh Circuit affirmed, observing that its decision "turn[ed] largely on the highly deferential standard prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1)." (App. A at 7a.)

The Seventh Circuit held that "the Illinois Appellate Court primarily relied on the fact that the State struck only two out of four African-American jurors of the thirty-six-person venire; that it used only two of its seven peremptory strikes against African-Americans; that at 16%, African-Americans were over-represented on the jury given that they comprised 11% of the venire; and that the victim and two of the witnesses were also African-American."

(App. A at 12a). The Seventh Circuit concluded that "the court's reference to these factors cannot be deemed *unreasonable*—as required by AEDPA." (*Id.*)

REASONS FOR GRANTING THE WRIT

This petition should be granted to settle a broad and fundamental Circuit split concerning *Batson v. Kentucky*, 476 U.S. 79 (1986). The Seventh Circuit held that it was not unreasonable under *Batson* for a state court to consider statistics based on the numbers and percentages of African American venirepersons included on the jury as factors weighing against an inference of discrimination. This Court has held, however, that decisions to include minority members on the jury do not excuse or explain decisions to exclude other minority members, at least at *Batson*'s *prima facie* stage.

Seven Circuits consider statistics concerning the racial composition of the jury as a legitimate basis to negate a *Batson* inference at the *prima facie* stage. Three Circuits have rejected that approach, and three of the seven Circuits that allow such consideration have conflicting authority on both sides of the issue.

Further, several state courts of last resort are in sharp conflict as to whether consideration of inclusion-based statistics is proper at the *prima facie* stage of a *Batson* inquiry. Given the depth and breadth of the divisions between the positions and the state of confusion within certain jurisdictions,

there is nothing to be gained by allowing this issue to percolate further.

I. This Petition Should Be Granted To Resolve A Circuit Split On Whether Courts May Consider Statistics Based On The Race of Included Jurors As A Basis To Negate A *Prima Facie* Inference Of Discrimination At *Batson*'s First Stage.

Statistics that focus on the number or percentage of racial or ethnic minorities that are allowed to participate on a jury should not be considered at the *prima facie* stage of a *Batson* inquiry because such statistics are irrelevant.

A. Consideration Of Inclusion-Based Measures Is Directly Contrary To And An Unreasonable Application Of This Court's Clearly Established *Batson* Jurisprudence.

This Court stated that inclusion of some African-Americans on a jury cannot insulate the exclusion of other African Americans from *Batson's* individualized scrutiny. In *Batson*, this Court noted that "[a] single invidiously discriminatory act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 U.S. at 95.

Statistics based on the numbers or percentages of minority members included on a trial jury do not in themselves demonstrate the absence of racial discrimination in the selection of the jury. Some courts have held that such statistics can indicate the

prosecution's "good faith" in exercising its peremptory strikes. However, this Court has long held, even prior to *Batson*, that "affirmations of good faith . . . are insufficient to dispel a prima facie case" of discrimination because "[t]he result bespeaks discrimination, whether or not it was a conscious decision." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). This Court has stated more recently that courts should not speculate as to the prosecutor's motives when "asking a simple question" at stage two of the *Batson* process would "produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Focusing on the inclusion of minority jurors as a sign of prosecutorial "good faith" could also provide prosecutors with an "easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." *People v. Snow*, 44 Cal.3d 216, 225, 242 Cal. Rptr. 477, 482 (Cal. 1987). As here, a prosecutor might switch gears after his discriminatory use of peremptory strikes elicits a *Batson* objection.

Inclusion-based statistics are also not relevant to the extent that they are used to show the lack of prejudice suffered by the defendant. This Court emphasized in *Powers v. Ohio*, 499 U.S. 400 (1991), that a *Batson* inquiry is designed to protect not only defendants but also individual jurors and the community from racially-motivated peremptory challenges. *Id.* at 411. Thus, "[b]ecause the right to nondiscriminatory jury selection procedures belongs

to the potential jurors . . . , the possibility that members [of a cognizable group] will get on the jury despite the intentional discrimination is *beside the point.*" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n. 13 (1994) (emphasis added).

Further, such statistics are not relevant as mere counterweights to an inference of discrimination, at least at the *prima facie* stage. This Court has held that evidence relating to the *strength* of an inference of purposeful discrimination is not relevant until the third stage of a *Batson* inquiry. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*) ("It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.") More recently, this Court described the "burden-shifting framework" of *Batson* as "just a means of arranging the presentation of evidence" and involving "no credibility assessment" at steps one or two. *Johnson*, 545 U.S. at 171 n. 6. Thus, if the only relevance of the inclusion of minority members on the jury pertains to the weight or persuasiveness of an inference of discrimination, consideration of such evidence at the *prima facie* stage of a *Batson* inquiry is no longer appropriate after *Purkett* and *Johnson.*

This Petition should be granted because inclusion-based statistics are irrelevant at the *prima facie* stage of a *Batson* inquiry, and therefore, consideration of such statistics is an objectively unreasonable application of *Batson.*

B. There Is A Broad Circuit Conflict Concerning The Relevance Under *Batson* Of The Inclusion Of Minority Members On The Trial Jury.

Recent decisions on both sides of the issue show that *Batson* is being applied unevenly nationwide and that the divisions are not resolving themselves.

1. Seven Federal Courts of Appeals Allow Courts To Consider The Inclusion Of Minority Members As A Relevant Basis To Defeat An Inference Of Discrimination.

Seven federal Courts of Appeal have, at one time or another, held that courts can consider the number or percentage of minority members on the trial jury as significant relevant circumstances that can negate a *prima facie* inference of discrimination. Many of these courts follow the leading decisions of *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986) and *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988). As this Petition discusses below, however, there is conflicting authority within three of these seven jurisdictions. *See infra* Sec. I.B.3.

The prosecution in *Dennis* used three out of its four peremptory strikes against African-American venirepersons. 804 F.2d at 1211. The Eleventh Circuit concluded that there was no viable *Batson* claim, however, because it was "obvious that the government did not attempt to exclude all blacks, or as many blacks as it could from the jury." *Id.* The court stated that "the unchallenged presence of two

blacks on the jury undercuts any inference of impermissible discrimination." *Id.*

A few months after the Eleventh Circuit decided *Dennis*, the Sixth Circuit decided *Sangineto-Miranda*. The Sixth Circuit stated that if "the percentage of minority members in the ultimate jury is the same or greater" than was present in the venire, "that would be a factor tending to negate the inference of discrimination." 859 F.2d at 1521-22. Similarly, the Sixth Circuit held that "[i]f there are minority members on the jury but the prosecutor did not use all its peremptory challenges, that would be a factor tending to refute discrimination." *Id.* at 1522.

Several courts have since cited to these leading cases as support for the consideration of inclusion-based statistics. In *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987), the Eighth Circuit relied upon *Dennis* and "[t]he fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors" as the basis to reject a *Batson* claim. *Id.* at 851. The Ninth Circuit would later cite to *Montgomery* as support for the claim that "the willingness of a prosecutor to accept minority jurors weighs against the findings of a prima facie [*Batson*] case." *United States v. Chinchilla*, 874 F.2d 695, 698 n. 4 (9th Cir. 1989).

Citing to both *Dennis* and *Montgomery*, the Fourth Circuit affirmed a conviction over an African American defendant's *Batson* claim which was based on the prosecution's peremptory strikes against two African American venirepersons. *United States v. Lane*, 866 F.2d 103, 104 (4th Cir. 1989). The Fourth Circuit concluded that the prosecutor's conduct in allowing two African American venirepersons to be seated on the jury "weighs heavily in support of the district court finding of no discrimination." *Id.* at 106-07. The Fourth Circuit reached the same conclusion in *United States v. Grandison*, 885 F. 2d 143 (4th Cir. 1989), and relied upon *Dennis, Montgomery, Sangineto-Miranda*, and *Lane* to support its conclusion that "the fact the jury included two black jurors is significant." *Id.* at 147. The Tenth Circuit followed *Grandison* in holding that the final composition of the jury is a relevant circumstance that can negate a *Batson* inference. *United States v. Esparsen*, 930 F.2d 1461, 1468 (10th Cir. 1991).

The First Circuit relied upon *Sangineto-Miranda* in holding that a defendant failed to demonstrate a "pattern" of strikes because the ultimate jury included several African-Americans. *United States v. Escobar-de Jesus*, 187 F.3d 148, 165 (1st Cir. 1999). The First Circuit recently stated that the possibility of seating minority members "might be critical to an assessment of whether a prima facie case was made." *United States v. Girouard*, 521 F.3d 110, 116-17 (1st Cir. 2008) (citing *Escobar-de Jesus*).

2. *Three Federal Courts Of Appeals Clearly Reject Reliance On The Inclusion Of Minority Members On The Trial Jury As A Basis For Defeating A* Prima Facie *Inference Of Discrimination.*

The leading cases that rejected the consideration of inclusion-based statistics as a basis to negate a *Batson* inference are *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988) and *United States v. Battle*, 836 F.2d 1084 (8th Cir. 1987).

In *Clemons*, the Third Circuit rejected the government's position that "there could be no prima facie case of discrimination under *Batson* because only two blacks were struck." *Id.* at 748. Similarly, in *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004), the Third Circuit concluded that "the final composition of the jury . . . offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race." *Id.* at 728. Even more recently, the Third Circuit rejected using the inclusion of minority members to defeat a *prima facie* showing of racial discrimination as "directly contrary" to *Batson*'s goal "to ensure that a State does not use peremptory challenges to remove *any* black juror because of his race." *Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005).

In *Battle*, the Eight Circuit emphasized that "the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black

jurors." *Id.* at 1086. In *United States v. Johnson,* 873 F.2d 1137 (8th Cir. 1989), the court rejected the argument that there was no *Batson* claim where the prosecutor had already seated two African American venirepersons, stating that this view constituted a "misreading of *Batson,*" and cited to *Battle* and *Clemons* for the proposition that "a *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the panel." *Id.* at 1139 - 40; *see also United States v. Moore,* 895 F.2d 484, 487 n. 5 (8th Cir. 1990) (recognizing that "it is the exclusion of blacks and not their inclusion (*i.e.* the final number) that is vital to a prima facie case of discrimination [under *Batson*].")

The Second Circuit has reversed a previously held position that allowed consideration of statistics based on the inclusion of minority members on a jury as a relevant factor negating a *prima facie* inference of discrimination. In *United States v. Alvarado,* 923 F.2d 253 (2d Cir. 1991) ("*Alvarado III*"), the Second Circuit rejected the argument that the prosecutor's failure to exercise an available challenge against a minority venireperson supported a finding of no *prima facie* case of discrimination, stating that "[t]he discrimination condemned by *Batson* need not be as extensive as numerically possible." *Id.* at 256. The Second Circuit stated further that "[a] prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations for what appears to be a statistically significant pattern of racial peremptory

challenges simply by forgoing the opportunity to use all of his challenges against minorities." *Id.*

Alvarado III was decided on remand from this Court, which had vacated the Second Circuit's previous decision in *United States v. Alvarado*, 891 F.2d 439 (2d Cir. 1989) ("*Alvarado I*"). *See Alvarado v. United States*, 497 U.S. 543, 544 (1990) (*per curiam*) ("*Alvarado II*"). In *Alvarado I*, the Second Circuit held that it did not need to reach the issue of whether the defendant had sufficiently alleged a *prima facie Batson* claim, because on review, it was entitled to take a "bottom line" approach and consider the fact that the racial composition of the jury reflected a fair cross section of the community. *Id.* at 445. Before this Court, however, the Solicitor General of the United States confessed that the Second Circuit's "bottom line" analysis was "contrary to *Batson*" and declined to pursue the argument, which led to this Court's remand and the Second Circuit's reversal. *Alvarado II*, 497 U.S. at 544.

3. Conflicting Lines Of Authority Exist In Three Circuits.

Three Circuits now have conflicting decisions on this issue. The Eleventh Circuit recently contradicted its earlier position in *Dennis* by holding that "[t]he trial court's exclusive reliance on a comparison of the proportion of blacks on the petit jury to the proportion of blacks in the venire to determine the presence of a *Batson* violation was in error." *Eagle v. Linahan*, 279 F.3d 926, 942 (11th Cir. 2001). The court concluded that, "[w]hile it may be

true that the prosecution's use of peremptory strikes did not result in a racially unbalanced petit jury, that is not the test for deciding whether there has been an equal protection violation." *Id.*; *cf. Fleming v. Kemp*, 794 F.2d 1478, 1483 (11th Cir. 1986) (rejecting the argument that *Batson* is inapplicable where the prosecutor did not exclude all black jurors); *but see United States v. Campa*, 529 F.3d 980 (11th Cir. 2008) (stating that the "well-established precedent" of *Dennis* "controls" the issue that defendants did not establish a *prima facie Batson* claim where the seated jury included two black persons).

The Sixth Circuit has also recently decided this issue in a manner that conflicts with its holding in *Sangineto-Miranda*. In *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), the Sixth Circuit, on habeas review, concluded that a state court's application of *Batson* was unreasonable in finding no violation in the peremptory challenge to an African American venireperson because of the prosecution's failure to strike subsequent African American venirepersons. *Id.* at 433-34. The Sixth Circuit concluded that "the prosecutor's decision to select a subsequent African-American juror from the venire does nothing to cure the wrong committed under *Batson*." *Id.* at 434. A recent Sixth Circuit opinion, however, expressly relied upon *Sangineto-Miranda* in finding no *Batson* violation where there was very little difference in the composition of the jury compared to the composition of the venire. *United States v. Ervin*, 266 Fed. Appx. 428, 432 (6th Cir. 2008).

Similarly, although the Seventh Circuit in this case held that it was not unreasonable under AEDPA for the Illinois Appellate Court to rely upon the inclusion of African Americans on the trial jury, it previously stated that the correctness of such an argument was "dubious, given *Batson*'s emphasis on the impermissible nature of discrimination against individual potential jurors" and given this Court's holding in *Connecticut v. Teal*, 457 U.S. 440, 442 (1982), which "reject[ed] the same kind of 'bottom line' approach for Title VII employment discrimination cases." *Coulter v. McCann*, 484 F.3d 459, 467-68 (7th Cir. 2007).

4. There Is Substantial Conflict Among State Courts Of Last Resort As To The Relevance Of Statistics Based On The Inclusion Of Minority Members On The Jury.

In addition to the broad split among federal courts, there is a substantial conflict among state courts of last resort about the continuing relevance of the statistics based on the inclusion of minority members on a jury as evidence tending to negate an inference of discrimination.

Illinois state courts have long considered the inclusion of minorities on a jury as a relevant circumstance that could negate an inference of discrimination. *See Williams*, 670 N.E.2d at 650; *see also People v. Houston*, 890 N.E.2d 424, 429 (Ill. 2008). North Carolina courts also consider the "acceptance rate" of minority jurors as a factor "tending to refute an allegation of discriminatory use

of [peremptory challenges]." *State v. Smith*, 400 S.E.2d 712, 724 (N.C. 1991). The California Supreme Court has cited to the acceptance of minority jurors approvingly as "an appropriate factor for the trial judge to consider in ruling on a [*Batson*] motion." *People v. Reynoso*, 74 P.3d 852, 867 (Cal. 2003).

However, state courts have also rejected consideration of inclusion-based statistics as irrelevant at the outset of a *Batson* inquiry. The New York Court of Appeals held that a defendant made out a *prima facie Batson* claim, despite the inclusion of African American venirepersons on the jury in a percentage resembling the percentage of African Americans in the community. *People v. Jenkins*, 554 N.E.2d 47, 58-59 (N.Y. 1990). The court stated that "the constitutional violation is the exclusion of *any* blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks." *Id.* at 558-59; *see also People v. Bolling*, 591 N.E.2d 1136, 1139 (N.Y. 1992) ("The wrong may occur after only one strike and the prosecution cannot . . . overcome it with evidence that the jury, as finally selected, contained a proportionate number of African-Americans.")

The D.C. Court of Appeals held that a comparison of the racial compositions of the jury and venire is an irrelevant factor. *Little v. United States*, 613 A.2d 880, 886 (D.C. 1992). The court noted that "the mere presence of blacks on the jury in a ratio similar to that of blacks in the venire or community does not

negate a defendant's prima facie case." *Id.* at 886. The Maryland Court of Appeals was also early to reject the notion that "*Batson* may be rendered a priori inapplicable by a prosecutorial game of numbers." *Stanley v. State*, 542 A.2d 1267, 1279 (Md. 1988).

Further, states that once accepted inclusion-based statistics have since rejected them as irrelevant. In Georgia, courts once openly considered such inclusion-based statistics as a basis to defeat a *Batson* inference. *See Aldridge v. State*, 365 S.E.2d 111, 115 (Ga. 1988).[1] The Georgia Supreme Court has since questioned the reasoning of *Aldridge*, holding that the "mere fact that the trial jury contained a greater percentage of black jurors . . . than were in the qualified venire . . . no longer is sufficient to rebut the inference of intentional discrimination." *Staples v. State*, 434 S.E.2d 757, 759 (Ga. 1993); *see also Weems v. State*, 416 S.E.2d 84, 85 (Ga. 1992) (discussing how this Court's evolving *Batson* jurisprudence cast *Aldridge* into doubt).

The Alabama Supreme Court has also changed its position on the relevance of inclusion-based statistics. In *Harrell v. State*, 571 So.2d 1270 (Ala. 1990), the Alabama Supreme Court observed that an

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[1] The Illinois Supreme Court originally cited to *Aldridge* as the basis for allowing Illinois courts to consider inclusion-based statistics. *People v. Evans*, 530 N.E.2d 1360, 1365 (Ill. 1988).

inference of discrimination could be negated with a showing that "a greater percentage of blacks sat on the jury than sat on the lawfully established venire." *Id.* at 1272. Four years later, however, in *Ex Parte Thomas*, 659 So.2d 3 (Ala. 1994), the Alabama Supreme Court disclaimed this observation, stating that "[a] skilled but racially biased attorney could learn to manipulate the strike process . . . as long as some blacks were left on the jury. Such a result should not be approved." *Id.* at 7.

The State of Missouri also changed its stance on the relevance of inclusion-based measures. In *State v. Parker*, 836 S.W.2d 930 (Mo. 1992), the Missouri Supreme Court described the "former practice of placing decisive reliance upon the presence of African-Americans on the defendant's jury . . . to undercut any inference of discrimination is no longer valid" because of this Court's evolving *Batson* jurisprudence. *Id.* at 940.

Clearly, fundamental divisions exist between state courts of last resort. Although a few courts have, upon close consideration of the issue, reversed their position and rejected inclusion-based statistics as irrelevant, other courts still uncritically accept such statistics as appropriate and even significant. The persistence of these divisions shows that there is no benefit to further percolation. This petition is an ideal vehicle for this Court to address this broad and fundamental dispute and ensure the uniform application of the Equal Protection principles of *Batson* nationwide.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for writ of certiorari.

Respectfully submitted,

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November 12, 2008

APPENDIX A

SEVENTH CIRCUIT OPINION

United States Court of Appeals, Seventh Circuit.
Michael FRANKLIN, Petitioner-Appellant,
v.
Gregory SIMS, Warden, Respondent-Appellee.
No. 06-4163.

Argued July 9, 2008.
Decided Aug. 14, 2008.

Background: Petitioner convicted in state court for armed robbery and sentenced to 23 years in prison filed petition for writ of habeas corpus. The United States District Court for the Northern District of Illinois, Milton I. Shadur, J., 2006 WL 3095673, denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:
(1) trial court's references to systematic exclusion of African-American jurors did not establish that wrong test was used to determine if *Batson* violation occurred, and
(2) consideration of entirety of jury selection process in evaluating whether prima facie *Batson* violation occurred was not unreasonable.

Affirmed.

*662 Barry Levenstam, Shorge K. Sato (argued), Jenner & Block, Chicago, IL, for Petitioner-Appellant.

Eric Truett (argued), Office of the Attorney General, Chicago, IL, for Respondent-Appellee.

Before POSNER, SYKES, and TINDER, Circuit Judges.

SYKES, Circuit Judge.

Michael Franklin, who is African-American, is serving a 23-year sentence in Illinois for armed robbery. He petitioned for a writ of habeas corpus, 28 U.S.C. § 2254, claiming that the prosecution violated his right to equal protection by exercising peremptory strikes against two of three African-American members of the first six-person panel of the jury venire. *See* *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The district court denied his petition. We affirm.

I. Background

In 2001 two men, both armed and masked, entered the King Food and Liquor Store in Chicago and stole $500-$600. Franklin was charged with the robbery and tried before a jury.

During jury selection, the State exercised peremptory strikes against jurors Margaret Cooley and Lance Tyson-two of the three African-American members of the first six-person panel of prospective jurors. Previous questioning had revealed that Cooley is a housekeeper who had never been accused of a crime nor been the victim of a crime. She did, however, disclose that she had relatives who had been raped and that her domestic partner had spent time in prison. Tyson is an attorney and has several

friends who are civil-court judges. He disclosed that he had received a speeding ticket, but when the prosecutor confronted him with his court records, Tyson admitted that the ticket was for driving under the influence (DUI).

The State struck Cooley and Tyson and accepted the remaining four jurors in the six-person panel. Franklin then made a *Batson* motion. The judge denied the motion, finding that Franklin failed to make out a prima facie case of discrimination. The following is the entire argument on the motion:

Def: Okay. All right, Judge.

Initially what I do is state for the record my client is African-American and Miss Cooley and Mr. Tyson are African-American and we could state that there don't appear to be any race neutral reasons for bumping those individuals. We request the State give reasons for bumping both of them.

Ct.: Well, that's not the standard.

Def.: Well, Judge, I'm establishing my prima facie case.

Ct.: How are you doing that?

Def.: There's nothing I've heard that gives any reason why these people would be bumped and [they're] African-American and my client is African-American.

Ct.: But again my understanding is there's got to be

*a showing of systematic exclusion of*well, I guess you are alleging African-Americans.

Def.: I've also got to make a record, Judge. If we get to the end of this three hours from now and I want to start referring to earlier people that were bumped.

Ct.: What I'm saying is these are [peremptory] challenges. You don't give reasons for [peremptory] challenges.

If your argument is that the State *has systematically excluded* African-Americans*663 because of your client's race, you have to show me how that's done.

Isn't Ms. Minefe African-American?[1]

St.: She is.

Def.: Again, Judge, they should indicate that for the [record]. What I'm saying is they bumped two people. The first two that are gone are African-American people. I'm stating that for the record.

Ct.: Okay. And you are making a *Batson* motion?

Def.: Okay.

Ct.: They don't give reasons until I say that *you*

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[1] Minefe was the third African-American member of the first panel.

have made a prima facie case of systematic exclusion.

So the panel that they have tendered to you contains one African-American. The complaining witness in this case, what race is he?

St.: He is African-American as well as the witnesses.

Ct.: And all the witnesses?

St.: Well, the other witness is Arab-American.

Ct.: I'm going to deny your motion. Here is your panel.

(Emphasis added.)

Franklin did not renew his objection at the conclusion of jury selection and did not object to the State's exercise of any other peremptory strikes. Ultimately, two members of the jury were African-American. Franklin was convicted and sentenced to 23 years' imprisonment.

Franklin appealed, and the Illinois Appellate Court affirmed his conviction over a dissent. The court first rejected Franklin's contention that the trial judge had denied his *Batson* motion pursuant to the standard articulated in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), which *Batson* had overruled. *Swain* required a defendant to "show the prosecutor's systematic use of peremptory challenges [on the basis of race] over a

period of time" to make out an equal protection violation. 380 U.S. at 227, 85 S.Ct. 824. The Illinois Appellate Court concluded that the voir dire transcript, read in its entirety, demonstrated that the judge was familiar with and applied the *Batson* standard.

The Illinois Appellate Court also rejected Franklin's attack on the trial judge's determination that he had not made out a prima facie case of discriminatory strikes under *Batson's* first step. The court explained *Batson's* three-step process: the defendant must first establish a prima facie case that the strikes were racially motivated; the burden then shifts to the prosecutor to come forward with a race-neutral reason for the strikes; and finally, the trial judge assesses the credibility of the explanation and determines whether purposeful discrimination has been established. The court next applied a six-factor test from a 1996 state case, *People v. Williams*, 173 Ill.2d 48, 218 Ill.Dec. 916, 670 N.E.2d 638 (1996), to conclude that Franklin had not made an adequate prima facie showing at step one. Specifically, the court noted that the victim and two of the three witnesses were also African-American (the third was Arab-American). This, the court said, undermined any inference of discrimination. The court then explained that the venire comprised thirty-six potential jurors, four of whom were African-American, and that the State's five other peremptory strikes had not been used against African-Americans. In the court's view, striking two of four African-American potential jurors did not amount to a pattern of discriminatory strikes, and using two of seven peremptory strikes against African-Americans

was not a disproportionate use of strikes against African-Americans.

*664 Next, the Illinois Appellate Court reasoned that the ultimate composition of the jury-16.7% African-American (two out of twelve)-did not raise an inference of discrimination because African-Americans had constituted only 11.2% of the venire. And finally, the court noted that both Cooley and Tyson had "raised some questions concerning their ability to serve on a jury." Specifically, the court observed that some of Cooley's family members had been crime victims and that Tyson was evasive about his DUI conviction.

Franklin then filed a pro se petition under 28 U.S.C. § 2254 renewing his *Batson* claim. The district court denied the petition, and this court granted a certificate of appealability.

II. Discussion

This case turns largely on the highly deferential standard prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1), for evaluating state-court decisions. To prevail, Franklin must show that the adjudication of his claim by the Illinois courts resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1); *see* *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). In other words, he must establish either that the Illinois court applied the wrong legal standard or that it applied the proper Supreme Court precedent in an

"objectively unreasonable manner," *Brown v. Payton*, 544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005), issuing a decision that fell "well outside the boundaries of permissible differences of opinion." *See Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir.2002). We assess the decision of the last state court to rule on the merits of a prisoner's claim. *Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir.2006). Thus, Franklin cannot prevail unless the Illinois Appellate Court unreasonably applied precedent from the United States Supreme Court in upholding the trial judge's denial of Franklin's *Batson* motion.

Franklin's first argument is not his strongest. He argues that the Illinois Appellate Court's decision is contrary to clearly established law because it upheld the trial judge's use of the overruled *Swain* standard. Franklin contends that the trial judge's repeated references to Franklin's need to show "systematic exclusion" demonstrates that the trial judge erroneously used the standard in *Swain*.

Batson expressly overruled *Swain's* requirement that a defendant must prove a "repeated striking of African-Americans over a number of cases," clarifying that a defendant may make the prima facie showing "by relying solely on the facts concerning selection *in his case*." *Batson*, 476 U.S. at 92-98, 106 S.Ct. 1712. In *McCain v. Gramley*, 96 F.3d 288, 293-94 (7th Cir.1996), we rejected an argument similar to Franklin's-namely, that the judge's reference to "systematic exclusion" meant that he had necessarily used the *Swain* standard-when a full reading of the transcript demonstrated otherwise.

Franklin reads too much into the judge's references to "systematic exclusion." The transcript demonstrates that the judge used that phrase simply to mean a pattern of strikes against African-Americans *in Franklin's case* which although not a necessary showing if other indicia of discrimination are present, is relevant to step one of the *Batson* inquiry. *See* *Batson*, 476 U.S. at 97, 106 S.Ct. 1712; *United States v. Stephens*, 421 F.3d 503, 512 (7th Cir.2005); *Holloway v. Horn*, 355 F.3d 707, 722 (3d Cir.2004). As the Illinois Appellate Court pointed out, all the questions the judge posed to defense counsel ***665** focused solely on the facts of Franklin's case. For example, the judge asked if there were any African-American jurors who had not been stricken and inquired about the races of the victim and the witnesses. Nothing in this exchange indicates that the judge was concerned with the State's use of peremptory challenges in other cases.

Franklin attempts to distinguish *McCain* by arguing that the trial judge in Franklin's case said nothing that demonstrated his familiarity with *Batson* whereas the judge in *McCain* cited *Batson*. *See* *McCain*, 96 F.3d at 293-94. Franklin is incorrect; the trial judge in Franklin's case also referred to *Batson* by name. The judge further demonstrated his familiarity with *Batson's* burden-shifting formula when he explained to defense counsel that the prosecution need not provide an explanation for its strikes until the court determined that Franklin had made a prima facie showing of discriminatory use of peremptories.

Franklin's second argument presents a closer question. He argues that even if the trial judge applied *Batson* and not *Swain*, the appellate court's decision was unreasonable because the court erroneously concluded that the trial judge applied *Batson* properly. Franklin contends that in evaluating his prima facie showing at step one, both the trial judge and the appellate court improperly considered whether he had *proved* discrimination-not whether he had *raised an inference* of discrimination as *Batson's* first step requires-and thereby compressed the three-part test into one, absolving the State of its duty to provide a race-neutral explanation for its strikes. In particular, Franklin points to the appellate court's discussion about potential reasons for the strikes, such as the fact that Cooley had family members who were crime victims and Tyson had been initially unwilling to disclose his DUI conviction. This aspect of the appellate court's opinion does give us pause.

About three months before the Illinois Appellate Court affirmed Franklin's conviction, the Supreme Court issued *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005), in which it emphasized that a defendant's burden at *Batson's* first step is light; the defendant need merely present "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* at 170, 125 S.Ct. 2410. As we have explained, *Johnson* clarified that "the burden at the prima facie stage is low, requiring only circumstances raising a suspicion that discrimination occurred, even when those circumstances are insufficient to indicate that it is more likely than not that the challenges were

used to discriminate." *Stephens*, 421 F.3d at 512; *see United States v. Abdush-Shakur*, 465 F.3d 458, 469 (10th Cir.2006) (same).

In addition, *Johnson* limited the ability of appellate courts to consider, at the prima facie stage, the apparent reasons for the challenges discernible from the record. We have explained that after *Johnson*, "an inquiry into apparent reasons [at the prima facie stage] is relevant only insofar as the strikes are so clearly attributable to that apparent, non-discriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes." *Stephens*, 421 F.3d at 516; *accord Williams v. Runnels*, 432 F.3d 1102, 1108-09 (9th Cir.2006) (likewise in light of *Johnson* limiting the inquiry into so-called "apparent" reasons for strikes at the prima facie stage); *see, e.g., Mahaffey v. Page*, 162 F.3d 481, 483 n. 1 (7th Cir.1998) (hypothesizing as an example that all the stricken panelists were lawyers). Thus, for example, we concluded in *666*Stephens* that the defendant had made out his prima facie case without reference to the government's post hoc reasons, which consisted of a combination of the stricken jurors' encounters with law enforcement officials, their criminal histories, and their litigation histories. *See Stephens*, 421 F.3d at 517-18.

Here, the State argues that the apparent reasons considered by the appellate court for striking Cooley and Tyson were fair game for consideration at the prima facie stage even after *Johnson*. But those potential reasons are of the same type as those at issue in *Stephens*, which this court refused to

consider in light of *Johnson*; the Illinois Appellate Court should not have considered them in Franklin's case. Doing so risked collapsing all three of *Batson's* steps into the prima facie inquiry.

But this was a small part of the appellate court's analysis, and there is no evidence from the voir dire transcript that the trial judge himself improperly collapsed *Batson's* three steps. In affirming the trial judge's decision, the Illinois Appellate Court primarily relied on the fact that the State struck only two out of four African-American jurors of the thirty-six-person venire; that it used only two of its seven peremptory strikes against African-Americans; that at 16%, African-Americans were overrepresented on the jury given that they comprised 11% of the venire; and that the victim and two of the witnesses were also African-American. Factors such as these are widely recognized as appropriate and important considerations at *Batson's* first step, even after *Johnson*, for determining whether an inference of discrimination has been raised. *See* *Batson*, 476 U.S. at 97, 106 S.Ct. 1712; *Stephens*, 421 F.3d at 512-15; *see also* *Boyd v. Newland*, 467 F.3d 1139, 1147 (9th Cir.2006); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1044-45 (11th Cir.2005); *Holloway*, 355 F.3d at 723. And while the burden of raising an inference of discrimination at the prima facie step is low, the court's reference to these factors cannot be deemed *unreasonable* as required by AEDPA. *Cf.* *Johnson*, 545 U.S. at 164, 125 S.Ct. 2410 (prima facie case made where State used three of twelve peremptory strikes to remove 100% of African-American venire members); *Williams*, 432 F.3d at 1107-08 (prima facie showing made where

State used three of first four challenges against African-Americans and there were only four African-Americans in forty-nine-person venire); *Stephens*, 421 F.3d at 513-15 (on direct appeal, prima facie case made where prosecutor used six of seven peremptory strikes against minorities); *Holloway*, 355 F.3d at 722 (prima facie showing made where State used eleven of twelve strikes against African-Americans).

Franklin argues that the Illinois Appellate Court should have focused on the fact that the State struck two of the three African-American panelists on the first six-person panel because it was at that point that the trial judge denied Franklin's *Batson* motion. Franklin's point is well-taken, but we cannot conclude it was *unreasonable* for the court to examine the entirety of the jury-selection process. Franklin does not point to any case that parses out the inquiry as he suggests, and both *Johnson* and *Stephens* countenance the methodology used by the Illinois Appellate Court.[2] *Cf.* *667 *Johnson*, 545 U.S. at 164, 125 S.Ct. 2410; *Williams*, 432 F.3d at 1107-08; *Stephens*, 421 F.3d at 513-15; *Holloway*, 355 F.3d at 722.

For the foregoing reasons, the judgment is AFFIRMED.

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[2] In addition, had Franklin renewed his *Batson* motion posttrial as he was in fact required to, *see People v. Enoch*, 122 Ill.2d 176, 119 Ill.Dec. 265, 522 N.E.2d 1124 (1988), the trial judge could have-and presumably would have-analyzed these same figures. The appellate court agreed to review the claim despite what was technically a waiver on Franklin's part only because the claim was of "constitutional dimension."

APPENDIX B

DISTRICT COURT OPINION

United States District Court,
N.D. Illinois, Eastern Division.

UNITED STATES of America ex rel. Michael FRANKLIN, Petitioner,

v.

Warden SIMS-Taylorville C.C., Respondent.

No. 06 C 5780.

Oct. 30, 2006.

Michael Franklin, Taylorville, IL, pro se.

Chief of Criminal Appeals, Attorney General's Office, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

MILTON I. SHADUR, Senior District Judge.
*1 Michael Franklin ("Franklin") has filed a 28 U.S.C. § 2254[1] Petition for Writ of Habeas Corpus ("Petition") to challenge his conviction on an armed robbery charge in the Circuit Court of Cook County-a conviction on which Franklin is serving a 23 year

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[1] All further references to Title 28's provisions will simply take the form "Section ."

custodial sentence. This Court has conducted the preliminary review called for by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"), and that review calls for dismissal of the Petition.

There is no question that Franklin has satisfied the timing and the exhaustion-of-remedies requirements of Sections 2244(d) and 2254(b)(1). As to both of those requirements, his direct appeal of his conviction included the one challenge that he now tenders to this Court-a *Batson* challenge to the jury selection process-so that it was addressed in detail by the Illinois Appellate Court for the First District in its September 9, 2005 unpublished order ("Order") in Case No. 1-03-2433, after which the Illinois Supreme Court denied Franklin's motion for leave to appeal on December 1, 2005.[2]

As a result of the 1996 congressional enactment colloquially referred to as AEDPA, the overturning of a reasoned state court adjudication of a federal constitutional claim has become far more difficult. Here is Section 2254(d):

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[2] Franklin then brought a state post-conviction petition "to give the trial court one full opportunity to review what had happened and to make an evaluation of his actions on the merits and contentions" (Petition Pt. II ¶ 1.C). When that petition was summarily dismissed, Franklin did not attempt to take an appeal-but the Illinois Supreme Court's earlier consideration and rejection of direct review of the Order, with its treatment of the *Batson* issue, had satisfied Franklin's obligation to tender that issue to the Illinois Supreme Court pursuant to *O'Sullivan v. Boerckel*, 426 U.S. 838, 845 (1999).

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In that respect, such cases as *Williams v. Taylor*, 529 U.S. 362, 409 (2000) and *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) require a state court's application of a "governing legal principle" under Section 2254(d)(1) to have been "objectively unreasonable"- that is, even more problematic than simply incorrect and clearly erroneous. Needless to say, our Court of Appeals has heeded that teaching-see, e.g., the thorough treatment of the subject in *Badelle v. Correll*, 452 F.3d 648, 654-55 (7th Cir.2006); and in the specific context of a *Batson* claim, see also *Anderson v. Cowan*, 227 F.3d 893, 896, 901-02 (7th Cir.2000).

In this instance the Illinois Appellate Court's Order engaged in a careful and extensive parsing of *Batson's* requirements in the detailed terms previously marked out by the Illinois Supreme Court in *People v. Williams*, 173 Ill.2d 48, 70-71, 670

N.E.2d 638, 649-50 (1996). True enough, that extended discussion (Order at 6-11) produced a similarly careful and extensive dissent from that court's Justice Neville (Order at 20-28). But it is not relevant whether, as a matter of first impression, which of those two Appellate Court opinions this Court might find more persuasive-what controls instead is that it cannot fairly be said that the majority opinion was "objectively unreasonable" in the sense required by AEDPA and the caselaw applying it.

*2 Hence the AEDPA standard for habeas relief has simply not been met. In those terms "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court" (Section 2254 Rule 4). And that being so, the same Rule 4 requires that this District Court dismiss the Petition, and it does so.

N.D.Ill.,2006.
U.S. ex rel. Franklin v. Sims
Slip Copy, 2006 WL 3095673 (N.D.Ill.)

APPENDIX C

ILLINOIS APPELLATE COURT OPINION

No. 1-03-2433

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 81 CR 28864
MICHAEL FRANKLIN,	)	Honorable William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Defendant, Michael Franklin appeals his conviction for armed robbery. On appeal, defendant contends that: (1) the court erred in determining that he had failed to establish a *prima facie* case of purposeful discrimination in the prosecutor's use of peremptory challenges; (2) the prosecutor deliberately elicited improper testimony from one of the police officers; and (3) the prosecutor made

numerous improper comments during closing arguments. We affirm.

At trial, Fursan Abu Sharikh testified that he had managed the King Food and Liquor Store located at 560 East 71st Street for the last four years. The store contained two security cameras, one located directly behind the cashier, the other located in the back of the store. Both cameras were "on" and working on May 23, 2001.

Mr. Sharikh testified that on May 23, 2001, employees Cindy Cal and Wilbert Oliver joined him in working the last shift at the store. At approximately 9:30 p.m., while standing in one of the store's aisles, Mr. Sharikh heard someone say, "Where is the Arab? Where is the Arab?" Mr. Sharikh looked behind him and saw a short man wearing a black jacket and holding a small gun enter the store, immediately followed by a big man, later identified as defendant, wearing a blue T-shirt and holding a big gun. Both men wore masks over their faces. Mr. Sharikh replied "I'm here; I'm here," after which the short man held the gun up to him and told him to get on the floor.

Mr. Sharikh testified that when he kneeled down on the floor, both armed men went behind the counter. Mr. Sharikh heard someone break the cash register, which contained approximately $500 to $600 dollars. Mr. Sharikh then saw both men come out from behind the counter and walk past him out the store. The bigger man was carrying the cash register full of cash. When he was approximately 10 feet away, the bigger man pulled his mask up over his eyes in order to breath. Mr. Sharikh immediately

recognized him as "Gorilla Mike", a regular customer who frequented the store almost everyday during the past two to three years and who had come into the store several times previously that same night. Mr. Sharikh observed that the black jacket worn by the shorter man during the robbery was the same jacket worn by defendant each time he had come into the store that night.

Mr. Sharikh testified that after the armed robbers left the store, he called the police. The next day, May 24, 2001, he and Cindy went to the police station. After viewing a lineup, Mr. Sharikh identified Fareed Jackson as the short armed robber. Mr. Sharikh picked defendant out of a photo array and identified him as the larger armed robber.

During its direct examination of Mr. Sharikh, the State played the footage of the store videotape from the security camera located behind the register. Mr. Sharikh identified defendant on the videotape, wearing the black jacket, blue T-shirt, and blue jeans at approximately 6:40 p.m. on the tape the night of the robbery. Mr. Sharikh identified defendant, wearing the same clothes, come into the store at approximately 7 p.m. accompanied by Fareed Jackson, who was wearing a green jacket. At approximately 7:35 p.m. on the videotape, Mr. Sharikh identified defendant buying some wine. At approximately 8 p.m. on the videotape, Mr. Sharikh again identified Fareed Jackson standing in the store, wearing a green jacket and white hat. At 8:05 p.m. and again a little after 8:15 p.m. on the tape, Mr. Sharikh identified defendant standing inside the store. At 9:30 p.m. on the same

videotape, Mr. Sharikh identified the armed robbers entering the store and forcing Wilbert Oliver to open the cash register.

The State also played for the jury the videotape taken from the security camera located at the rear of the store. Mr. Sharikh identified defendant and Fareed Jackson at approximately 9:30 p.m. on the videotape, standing behind the counter, looking for money. Approximately three minutes later on the videotape, Mr. Sharikh identified defendant pushing his mask up and then pulling his mask down again.

On cross-examination, Mr. Sharikh testified that he recognized defendant's voice as that belonging to "Gorilla Mike" and he estimated defendant's weight at the time of the robbery to be somewhere between 220 and 230 pounds. Mr. Sharikh also testified that he told the police officer who responded to his 911 call that the big armed robber was "Gorilla Mike."

Wilbert Oliver testified that he had worked at the King Food and Liquor Store off and on for the past 14 years. During a work break on May 23, 2001, he saw defendant standing outside the store and recognized him as the person referred to as "Gorilla Mike." Mr. Oliver described defendant as one of the store's regular customers. Later on May 23, Mr. Oliver saw defendant in the store with a man named Fareed, who was approximately five feet tall and weighed 130 pounds.

Mr. Oliver testified that at approximately 9:30 p.m. on May 23, he took a break from work and sat

down next to the lotto machine behind the counter. While his eyes were closed, he heard someone say "Put your damn hands up." Mr. Oliver opened his eyes and saw a person with a stocking over his face pointing a silver gun at him. Mr. Oliver put his hands up and the gunman told him to get on the floor, at which time he laid down on his stomach and prayed for his life. Mr. Oliver testified that he recognized the gunman's voice and height and identified him as Fareed.

Mr. Oliver testified that a second person wearing white tennis shoes lifted him off the floor, punched him in the stomach with a sawed-off shotgun, and told him to open the cash register. Though the second gunman had a brown, Halloween mask over his face, Mr. Oliver recognized his voice and heavy build and identified him as defendant. Defendant walked him over to the cash register, but Mr. Oliver was unable to open it because Fareed had locked the machine by pressing the wrong buttons. Defendant again told Mr. Oliver to open the cash register. Mr. Oliver slammed the cash register on the floor, pushed it toward defendant with his foot, told defendant to take the cash and go, and then laid back down on the floor. Mr. Oliver saw defendant pick up the cash register, move out from behind the counter, and walk out the door.

Cindy Cal testified that she had been employed as a cashier at the King Food and Liquor Store for eight or nine years. She testified that defendant was a regular customer known as "Gorilla Mike." On May 23, 2001, defendant came into the store several times and asked people for money.

Defendant was accompanied by Fareed, another customer who had previously frequented the store.

Ms. Cal testified that at 9:30 p.m. on May 23, while standing at the cash register behind the counter, she saw a short man followed by a taller man come into the store. The smaller man wore a stocking cap over his face, a black leather jacket, and carried a silver gun. The black leather jacket was similar to the jacket worn by defendant earlier that evening. Ms. Cal testified that she could see through the stocking worn by the smaller man, and that she recognized him as Fareed. Ms. Cal also testified that the larger man wore a mask, a blue shirt, and carried a gun. He kept lifting his mask over his nose as if he could not breathe. After he lifted his mask, Ms. Cal recognized the larger armed robber as Gorilla Mike.

Ms. Cal testified that Fareed walked behind the counter while defendant pushed her and ordered her to go to the back of the store. As she walked to the back, she saw Wilbert Oliver lying on the floor. Ms. Cal testified that she and a customer waited in the back as ordered by defendant. She did not leave the back of the store until Mr. Sharikh came to get her after defendant and Fareed left the store. She immediately locked the store's door. When the police arrived, she described Fareed as 17 years old, weighing 130 pounds and measuring five foot three inches tall. She described defendant to police as five foot seven inches tall and weighing approximately 220 pounds.

Ms. Cal testified that the next day, May 24, 2001, she went with Mr. Sharikh to the police

station, where she picked a photograph of defendant out of a photo array and identified him as the taller armed robber. Ms. Cal also picked Fareed out of a line-up and identified him as the smaller armed robber.

Detective Alejandro Almazan testified that Mr. Sharikh and Ms. Cal separately identified Fareed Jackson in a lineup. Detective Almazan also testified that Mr. Sharikh and Ms. Cal separately picked out defendant's photo from a photo array.

Defendant presented the testimony of Officer Larry Ellison, the policeman who responded to the 911 call placed after the armed robbery. Officer Ellison testified that none of the witnesses told him that they knew defendant or that defendant's street name was "Gorilla Mike."

The jury convicted defendant of armed robbery and the trial court sentenced him to 23 years in prison. Defendant filed this timely appeal.

First, defendant argues that the State unconstitutionally exercised a peremptory challenge to exclude two African-American venirepersons in violation of the principles set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). The State argues that defendant waived review by failing to raise the issue in his post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176 (1988). Because the issue is of constitutional dimension, though, we will review the argument on its merits. See *People v. Centeno*, 333 Ill. App. 3d 604, 615 (2002).

In *Batson*, the United States Supreme Court held that in a criminal case the fourteenth amendment's equal protection clause prohibits the State from using a peremptory challenge to exclude a prospective juror solely on the basis of his or her race. *Batson,* 476 U.S. at 89, 90 L. Ed. 2d at 83, 106 S. Ct. at 1719. The *Batson* court provided a three-step process for evaluating claims of discrimination in jury selection. First, defendant must make a *prima facie* showing that the State exercised its peremptory challenge on the basis of race. *People v. Easley*, 192 Ill. 2d 307, 323 (2000). If the defendant makes a *prima facie* showing, the burden shifts to the State to articulate a race-neutral reason for excusing the venireperson. *Easley*, 192 Ill. 2d at 323-24. Once the State articulates its reasons for excusing the venireperson, the trial court determines whether the defendant has carried his burden of establishing purposeful discrimination. *People v. Williams*, 173 Ill. 2d 48, 70-71 (1996).

To establish a *prima facie* case of purposeful discrimination by the State in the exercise of its peremptory challenges, defendant must present relevant circumstances which raise an inference that the State challenged venirepersons on account of their race. Such relevant circumstances include: (1) the racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and

while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witness. *Williams*, 173 Ill. 2d at 71. The trial court's determination of whether a prima facie case has been shown will not be overturned unless it is against the manifest weight of the evidence. *Williams*, 173 Ill. 2d at 71.

The first relevant circumstance is whether defendant and the excluded venirepersons shared the same race. Here, defendant and the two venirepersons are both African-Americans. Although this circumstance is relevant, it is not dispositive in determining whether a *prima facie* case exists. *Williams*, 173 Ill. 2d at 72.

Next, we consider whether the State's use of its first two peremptory challenges against African-American venirepersons constituted a pattern of strikes. Defendant failed to preserve a record of the relevant data, specifically, defendant failed to preserve the actual numbers of African-Americans in either the venire or the jury, nor the races of the five other people peremptorily challenged by the State. The resulting ambiguity in the record is construed against the defendant. *People v. Mays*, 257 Ill. App. 3d 137, 148 (1993).

Construing the ambiguities in the record against the defendant, we can glean that the original venire contained 36 people of which four were identified as African-American. Thus, in terms of whether the State's first two peremptory challenges constituted a pattern of strikes, the only conclusion

supported by the record is that the State struck two out of four African-Americans, or 50%. Such numbers did not constitute a pattern of strikes. See *People v. Lann*, 261 Ill. App. 3d 456 (1994) (six out of nine African-American venirepersons struck did not constitute a pattern of strikes); *People v. Brisbon*, 129 Ill. 2d 200 (1989) (two out of three African-American venirepersons struck did not constitute a pattern of strikes.)

Next, we consider whether the State used a disproportionate number of peremptory challenges against African-American venirepersons. The defendant used seven peremptory challenges; the defendant has identified only two out of those seven as against African-Americans. Such numbers did not constitute a disproportionate number of peremptory challenges against African-American venirepersons. See *People v. Mayes*, 257 Ill. App. 3d 137 (1993) (two out of three peremptory challenges was insufficient to demonstrate a disproportionate number of strikes against African-Americans.)

Next, we consider the level of African-American representation in the venire as compared to the jury. Construing the incomplete record against defendant (*Mayes*, 257 Ill. App. 3d at 148), defendant has identified 2 out of 12 jurors who were African-American and 4 out of 36 venirepersons who were African-American. In terms of percentages, African-Americans constituted 16.7% of the jury, but only 11.2% of the entire venire. These numbers belie any claim of purposeful discrimination against African-Americans. See *People v. Edwards*, 301 Ill. App. 3d 966 (1998) (holding that no *prima facie* case

was established where the percentage of African-Americans on the jury exceeded that in the venire.)

Next, we consider whether the State's questions and comments during *voir dire* examination and while exercising peremptory challenges raise an inference of discriminatory intent. The record reflects no such questions or comments by the prosecutor.

Next, we consider whether the excluded African-American venirepersons, Ms. Cooley and Mr. Tyson, were a heterogeneous group sharing race as their only common characteristic. The statements of Ms. Cooley and Mr. Tyson during *voir dire* raised some question concerning their ability to serve on the jury and thus they shared a characteristic other than race. Specifically, Ms. Cooley indicated that some family members had been raped and she expressed some initial uncertainty as to whether she could put that aside and give the defense and State a fair trial. Mr. Tyson initially indicated that he had been the defendant in traffic court only on a speeding ticket, but later admitted under further questioning that he had a DUI and that his license had been suspended. See *Edwards*, 301 Ill. App. 3d at 974 (finding that venirepersons shared characteristic other than race when they made comments during *voir dire* that raised questions concerning their ability to serve on the jury.)

Finally, we consider the race of the defendant, victim, and witnesses. The defendant was African-American as were all the victims-witnesses except one, Mr. Sharikh, who was Arab-American. Where the defendant and victim are both African-American,

their racial characteristics do not warrant an inference, at the *prima facie* stage, that the prosecution discriminated against African-American venirepersons. *People v. Andrews*, 146 Ill. 2d 413, 433 (1992).

In sum, the relevant factors do not indicate purposeful discrimination by the State. The trial court's finding that defendant failed to establish a *prima facie* case of purposeful discrimination by the prosecution's exercise of peremptory challenges is not against the manifest weight of the evidence.

Defendant argues, though, that the trial court did not consider all the relevant circumstances and that in denying the *Batson* motion, the trial court indicated that the defendant had failed to show any "systematic exclusion" of African-American jurors. Defendant contends that the use of the phrase "systematic exclusion" evidences that the trial court was operating under a pre-*Batson* standard. See *Swain v. Alabama*, 380 U.S. 202, 223, 13 L. Ed. 2d 759, 774, 85 S. Ct. 824, 837 (1965).

Review of the entire record indicates that the court was aware of the *Batson* standard, that the court was aware that defendant was required to set forth a *prima facie* case of discrimination, and that the court was aware there were several relevant circumstances to consider in determining whether a *prima facie* case had been established. Specifically, at the hearing, the trial court stated his understanding that defendant was "making a *Batson* motion." When defense counsel requested that the State give reasons for excusing particular venirepersons, the court stated "that's not the

standard" and inquired as to how defense counsel had established his *prima facie* case. Further, the court inquired as to the race of the "complaining witness" and "all the [other] witnesses," which are relevant circumstances in determining whether defendant has made a *prima facie* case of purposeful discrimination under *Batson*. Later, when the State complained about defense counsel's excusing particular venirepersons, the court made other statements indicating his awareness of the *Batson* standard. Specifically, the court expressly noted that the State was making a "reverse *Batson*" motion, and he again indicated his understanding that the movant was required to make a *prima facie* case. The court also indicated his awareness of relevant case law, stating, "I mean certainly you have read *Batson* cases where African-Americans were left on the jury and the court still found that there was a *Batson* violation." Thus, review of the entire record establishes that the court was operating under the *Batson* standard; we find no error.

* * *

For the foregoing reasons, we affirm the circuit court.

Affirmed.

OBRIEN, J. and GALLAGHER, P.J., concurring; NEVILLE, J., dissenting.

JUSTICE NEVILLE, dissenting:

I respectfully dissent from the majority's order. In its order, the majority addresses the

defendant's argument that the trial court incorrectly applied the wrong standard – whether the defendant established the "systematic exclusion" of African-Americans – when it denied his *Batson* motion. However, the majority dismissed the defendant's argument by stating that a review of the "entire record" indicated that the court was aware of the *Batson* standard. Rather than focusing on the trial judge's failure to follow the three step *Batson* procedure during the defendant's *Batson* motion hearing, the majority considers statements by the trial judge from two separate *Batson* motion hearings, the defendant's *Batson* motion hearing and the State's *Batson* motion hearing, and concludes that the trial judge was "aware" of *Batson*. In my opinion, if the trial judge had followed the three step *Batson* procedure during the defendant's *Batson* motion hearing, it would be unnecessary for the majority to consider statements made by the trial judge during the State's *Batson* motion hearing.

In order to determine if the trial judge applied the *Swain* "systematic exclusion" rule instead of the three step *Batson* rule, I limit my review to the hearing on the defendant's *Batson* motion:

> MR. FULTON: Okay. All right, Judge. Initially what I do is state for the record my client is black and Miss Cooley and Mr. Tyson are black and we could state that there don't appear to be any race neutral reasons for bumping those individuals. We request the State give reasons for bumping both of them.

THE COURT: Well, that's not the standard.

MR. FULTON: Well, Judge, I'm establishing my prima facie case.

THE COURT: How are you doing that?

MR. FULTON: There's nothing I've heard that gives any reason why these people would be bumped and their [sic] black and my client is black.

THE COURT: But again my understanding is there's got to be a showing of a systematic exclusion of -- well, I guess you are alleging African Americans.

MR. FULTON: I've also got to make a record, Judge. If we get to the end of this three hours from now and I want to start referring to earlier people that were bumped.

THE COURT: What I'm saying is these are preemptory [sic] challenges. You don't give reasons for preemptory [sic] challenges. If your argument is that the State has systematically excluded African Americans because of your client's race, you have to show me how that's done. Isn't Miss Minefe African American?

MR. SWART: She is.

MR. FULTON: Again, Judge, they should indicate that for the report. What I'm saying is they bumped two people. The first two that are gone are black people. I'm stating that for the record.

THE COURT: Okay. And you are making a Batson motion?

MR. FULTON: Okay.

THE COURT: They don't give reasons until I say that you have made a prima facia case of systematic exclusion. So the panel that they have tendered to you contains one African American. The complaining witness in this case, what race is he?

MR. McCORMICK: He is African American as well as the witnesses.

THE COURT: And all the witnesses?

MR. McCORMICK: Well, the other witness is Arab American.

THE COURT: I'm going to deny your motion. Here is your panel."

The record establishes that when presented with the defendant's *Batson* motion, the trial court applied the overruled *Swain* rule and made three references

to *Swain* during what should have been a *Batson* hearing. The first time the trial court referred to *Swain* by making the following statement.

> "But again my understanding is there's got to be a showing of a systematic exclusion of - - well, I guess you are alleging African Americans."

The trial court makes a second reference to the *Swain* standard when it made the following statement:

> "What I'm saying is these are preemptory [sic] challenges. You don't give reasons for preemptory [sic] challenges. If your argument is that the State has systematically excluded African Americans because of your client's race, you have to show me how that's done. Isn't Miss Minefe African American?"

Before denying the defendant's *Batson* motion, the trial court makes its third and final reference to the *Swain* standard:

> "They [the State] don't give reasons until I say that you have made a prima facia case of systematic exclusion. So the panel that they have tendered to you contains one African American. The complaining witness in this case, what race is he?"

The trial judge's only reference to *Batson* during the hearing on defendant's motion was when he asked a question: "And you are making a Batson motion?" In light of the preceding statements that were made by the trial judge during the hearing on the defendant's motion, I think the majority was in error when it found that the trial court was aware of the *Batson* standard.

I disagree with the majority's finding that the trial court was aware of the *Batson* standard because the trial court relied on *Swain* and did not use the three step *Batson* analysis when ruling on the defendant's *Batson* motion. I believe the trial court abused its discretion when it applied the *Swain* rule and determined that a *prima facie* case of discrimination was not presented. See *People v. Coleman*, 155 Ill. 2d 507, 514 (1993) (a finding that defendant has failed to demonstrate a *prima facie* case of purposeful discrimination is a finding of fact that will not be reversed unless it is against the manifest weight of the evidence). First, the facts from the hearing on the defendant's *Batson* motion clearly establish that the trial court incorrectly applied the *Swain* rule to the defendant's *Batson* motion when it required the defendant to make a showing of "systematic exclusion" of African-Americans from the venire in order to establish a *prima facie* case of discrimination by the prosecution when it exercised its peremptory challenges. See *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965). Second, by failing to apply the *Batson* rule, the trial court denied the defendant equal protection of the law.

Clearly, the case law is uncontroverted that the starting point for any discussion of the discriminatory use of peremptory challenges is the *Batson* case itself. See *Coleman*, 155 Ill. 2d at 511-518; *People v. Young*, 128 Ill. 2d 1, 17-28 (1989); *People v. Wiley*, 156 Il. 2d 464, 472-477 (1993); and *People v. Andrew*, 146 Ill. 2d 413, 418-422 (1992). The *Batson* court explains the fundamental importance of ensuring that peremptory challenges are used in a non-discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S.Ct. 1712 (1986). The *Batson* court also held that the State's use of peremptory challenges in a racially discriminatory manner violates an accused's right to equal protection. *Batson*, 476 U.S. at 86, 90 L. Ed. 2d at 80, 106 S.Ct. at 1717. The Supreme Court also recognized that racial discrimination in jury selection unconstitutionally discriminates against the excluded juror. *Batson*, 476 U.S. at 87, 90 L. Ed. 2d at 81, 106 S.Ct. at 1718, citing *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880). Finally, recognizing the public policy need for non-discriminatory jury selection, the *Batson* court acknowledged that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87, 90 L. Ed. 2d at 81, 106 S. Ct. at 1718.

In order to effectuate the Equal Protection Clause and uphold the accused's sacred right to a jury trial, the Supreme Court promulgated a three-step procedure for courts to use when they review one party's challenge to another party's exercise of its peremptory strikes. *Batson*, 476 U.S. at 93-98, 90

L. Ed. 2d at 85-89, 106 S. Ct. at 1721-1724; see also *People v. Harris*, 206 Ill.2d 1, 17 (2002)(outlining the three-step procedure as applied by Illinois courts). First, the defendant must make a *prima facie* showing that the State exercised its peremptory challenges on the basis of race. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d 69, 106 S. Ct. at 1723; *Harris*, 206 Ill.2d at 17. In order to establish a *prima facie* case of discrimination under *Batson*, the defendant must raise the inference that the prosecutor exercised peremptory challenges to remove venire members based upon their race. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723; *People v. Edwards*, 144 Ill.2d 108, 153 (1991). Second, after a *prima facie* case is made, the State must articulate a race-neutral justification for excusing the venirepersons in question. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d 69, 106 S. Ct. at 1723, *Harris*, 206 Ill.2d at 17. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d 69, 106 S. Ct. at 1723, *Harris*, 206 Ill.2d at 17.

The Illinois Supreme Court has instructed trial judges to consider certain factors at the *prima facie* stage to determine whether the defense has demonstrated purposeful discrimination. *People v. Williams*, 173 Ill.2d 48, 71 (1996); see also *People v. Hudson*, 157 Ill.2d 401, 426 (1993). The *Williams*, and *Hudson* courts instruct trial courts, when determining whether a *prima facie* case of discriminatory jury selection has been established, to consider the following relevant circumstances: (1) racial identity between the defendant and the

excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses." *Williams*, 173 Ill.2d at 71; *Hudson*, 157 Ill. 2d at 426.

The exclusion of even one minority veniremember on the basis of race is unconstitutional. *Wiley*, 156 Ill. 2d at 476. At the *prima facie* phase, the trial court is only concerned with whether the stricken African-American veniremembers shared any characteristics other than race, and the trial court is not to search for possible reasons for the prosecution's strikes or for similarities between stricken African-Americans and accepted white veniremembers. *People v. Champs*, 273 Ill. App. 3d 502, 508 (1995), citing *Henderson*, 142 Ill. 2d 258, 290, (1990) (overruled on other grounds). In this case, the trial court never followed the three step *Batson* analysis, because *Swain*, an overruled pre-*Batson* standard, was applied and a *Batson* analysis was never entertained.

The trial court's reference to the pre-*Batson* test of "systematic exclusion" established in *Swain*, is improper as that portion of the *Swain* decision was clearly overturned. *Batson*, 476 U.S. at 92-93, L. Ed.

2d at ____, 106 S. Ct. at 1720-1721; see also *Wiley*, 156 Ill.2d at 474-75 (defendant argued that the trial court improperly used the "systematic discrimination" standard in finding no *prima facie* case of purposeful discrimination; the Illinois Supreme Court agreed and commented that "Although we cannot conclude on the present record that the trial court undertook a strict and literal application of the outdated *Swain* test in the instant cause, we nevertheless find the remarks made by the trial court were improper and misguided"). Although I found only one appellate court decision where the court believed a trial court's reference to the pre-*Batson* standard of "systematic exclusion" did not automatically make the trial court's determinations to be against the manifest weight of the evidence (See *People v. Smith*, 236 Ill. App. 3d 812, 818 (1992) (the *Smith* court acknowledged that the trial court used the terminology "systematic exclusion," but did not believe it was operating under a pre-*Batson* standard because the prosecutor was required to state his reasons for excluding the Black jurors), this decision is contrary to both *Batson* and *Wiley*. *Batson*, 476 U.S. at 92-93, L. Ed. 2d at ___, 106 S. Ct. at 1720-1721, *Wiley*, 156 Ill.2d at 473-75. In the instant case, the trial court's reference to an overruled standard coupled with its failure to follow the three step *Batson* procedure begs the question of whether the defendant has demonstrated purposeful discrimination.

More compelling, however, is the *Batson* court's own clear directive that the interpretation that *Swain* required a showing of systematic exclusion placed on defendants a crippling burden of

proof, and made the prosecutor's peremptory challenges largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93, L. Ed. 2d at 87, 106 S. Ct. at 1720-1721. In *Swain*, the court held that purposefully denying blacks the opportunity to participate as jurors on account of their race violated the Equal Protection Clause. *Swain*, 380 U.S. 202, 13 L. Ed 2d 759, 85 S. Ct. 824. Under *Swain*, unless the prosecutor admitted outright that he had struck someone who was black solely on account of race, a defendant had to demonstrate "systematic exclusion" of blacks from the venire, which required a defendant to compile evidence from multiple trials and to be able to demonstrate a racially discriminatory pattern. *Swain*, 380 U.S. 202, 13 L. Ed 2d 759, 85 S. Ct. 824. Given this impossible evidentiary burden, there were few instances in which a defendant proved a claim that a prosecutor's use of peremptory challenges had been discriminatory.

By overturning *Swain's* systematic exclusion requirement, the *Batson* court specifically "reject[ed] this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Batson*, 476 U.S. at 92-93, L. Ed. 2d at 87, 106 S. Ct. at 1720-1721; see also "*The Equal Protection Clause, The Free Exercise Clause and Religion Based Peremptory Challenges*," 63 U. Chi. L. Rev. 1639, 1644-1645 (Fall, 1996) (*Batson* overruled *Swain*'s "systematic exclusion" requirement); P. M. Egan, *Supreme Court Signals An End To Discriminatory Use Of Peremptories Now That Racially Discriminatory Peremptory Challenges*

Have Been Prohibited In Civil Proceedings, Will The Next Step Be Gender-Based Strikes?, 60 Def. Couns. J. 264, 268 (1993). (*Batson* overruled that portion of *Swain* which required a "systematic exclusion" of a cognizable racial group over a lengthy period of time in order to assert a valid equal protection claim and held that a prima facie case of discrimination may be made solely on the record of the jury selection of the trial in question); B. Serr, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 13 (1998) (the *Batson* court, recognizing historical transition, rejected the *Swain* standard for proving discriminatory use of peremptory challenges by ruling that a defendant may base an equal protection violation on a prosecutor's use of peremptory challenges in a single case).

The trial court's errors are further amplified in two recent United States Supreme Court cases, *Miller-El v. Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. 2317 (2005), and *Johnson v. California*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. 2410 (2005), in which the court analyzed both *Swain* and *Batson*. The *Miller-El* Court stated that:

> "Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with

> a weakness of its own owing to its very emphasis on the particular reason a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. at 2325.

The court further reasons that "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If a stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. at 2332.

Even more compelling, the *Johnson* court makes clear that the United States Supreme Court "did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." *Johnson*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. at 2413. The *Johnson* court makes it clear that a defendant satisfies the first-step requirements of *Batson* by simply "producing evidence sufficient to permit the trial judge to draw an *inference* that discrimination has occurred." (Emphasis added) *Johnson*, ___ U.S. ___, ___ L. Ed. 2d ___, 125 S. Ct. at 2413. I believe *Miller-El* and *Johnson* would mandate that the trial judge draw such an *inference* in this case based on

the fact that two of the three African-American veniremembers, or 66%, in the first panel had peremptory challenges exercised against them by the State.[4] Therefore, because the trial court failed to follow the three-step *Batson* procedure, I respectfully dissent from the majority's order.

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[4] The State received the following jurors in the first panel:

1. Mr. Rowling (White)
2. ~~Ms. Cooley (Black)~~
3. Mr. Palasz (White)
4. Ms. Minefe (Black)
5. ~~Mr. Tyson (Black)~~
6. Ms. Freels (White)

Both Ms. Cooley and Mr. Tyson had peremptory challenges exercised against them by the State.

APPENDIX D

VOIR DIRE TRANSCRIPT (EXCERPTS)

18

Now, having told you that, I ask all of you to stand up, raise your right hands to be sworn before we begin the questioning.

(Prospective jurors were sworn)

THE COURT: Please be seated. All right.

Ladies and gentlemen, the way this is going to work is first I'm going to call out 25 names.

What I'm going to ask you to do is fill up the back row of the jury box, the one closest to the wall.

Come all the way across to the seat closest to the court reporter and fill up that row and then fill up the remaining rows in the same fashion.

Charles Rolwing. R-O-L-W-I-N-G.

Margaret Cooley.

C-O-O-L-E-Y.

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Karl Palasz. P-A-L-A-S-Z. K - A - R - L.

Estella Guzman. G-U-Z-M-A-N.

MR. SWART: Judge, I think that –

THE COURT: You have to go all the way down the way I called you in order. All the way closest to the court reporter, please.

Alma Minefe. M-I-N-E-F-E.

Lance Tyson. T-Y-S-O-N.

Thomas Roat. R-O-A-T.

Catherine Freels. F-R-E-E-L-S.

Dorothy Gandy. G-A-N-D-Y.

James McVicker. M-C-V-I-C-K-E-R.

Loyd Hendrix. H-E-N-D-R-I-X.

Michael Moore. M-O-O-R-E.
Juan Perez. P-E-R-E-Z. J UA N. First name.

Joy Mary Speciale. S-P-E-C-I-A-L-E.

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Nan Williams. All the way down in the back row there. If you need to push the seat in front of you forward a little, that's fine

James VanAllen. V-A-N-A-L-L-E-N.

Sally Lindsey. L-I-N-D-S-E-Y.

James Garbarini. G-A-R-B-A-R-I-N-I.

Jennifer Simon. S-I-M-O-N.

Carla McManus. M-C-M-A-N-U-S. Carla.

Brian Cerveny. C-E-R-V-E-N-Y.

Raymond Schwarz. S-C-H-W-A-R-Z.

Toman Flannery. F-L-A-N-N-E-R-Y. Toman, first name.

Nancy Kersten. K-E-R-S-T-E-N. Nancy.

All right. Tracy and I'm going to spell the last name. S-U-Y-K-E-R-B-U-I-K.

Ladies and gentlemen, it is almost 12:40. What I'm going to do we are going to take a lunch break now. I'm going to ask you to return here at 1:40 and we

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will begin the questioning process. Those of you that are in the courtroom, please take note of where you are seated and take exactly the same seat when you return.

Those of you in the audience can sit wherever you want when you return.

Again my name is Lacy. L-A-C-Y. You should come directly to courtroom 205 after lunch. We will see you back here at 1:40.

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MARGARET COOLEY, called as a prospective juror herein, was examined and testified as follows:

DIRECT EXAMINATION BY THE COURT:

Q. Miss Cooley, you live on the south side of Chicago, ma'am?

A. Yes.

Q. What do you do for a living?

A. Housekeeper.

Q. How long have you been in that field?

A. 20 years.

Q. 20 years. And are you married, ma'am?

A. No.

Q. Do you have a domestic partner?

A. Yes.

Q. And was your domestic partner do for a living?

A. He is not working.

Q. He is not working?

A. Uh-huh.

Q. When he was working, what was he doing?

A. He worked for Century Tile.

Q. As a salesman?

A. I guess a clerk, a store clerk.

Q. And you have three children, 11, 20, 24?

A. Yes.

Q. The older ones are they in school or are they working?

A. Two in school and one is working.

Q. And which one would that be?

A. Lamont.

Q. I mean the 24 year old?

A. Uh-huh.

Q. What type of work does Lamont do?

A. All kinds. McDonald's.

Q. Number of different jobs?

A. Uh-huh.

Q. None of them are in law enforcement I take it?

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A. No.

Q. Have you ever served on a jury before?

A. No.

Q. Have you ever been an accused, complainant or a witness in a criminal case?

A. No.

Q. Have you ever been the victim of a crime?

A. No.

Q. Has an immediate family or close friend ever been the victim of a crime?

A. Yes.

Q. And who would that be, ma'am?

A. My niece.

Q. And what type of crime was it?

A. I would rather not say.

Q. How long ago was that?

A. About ten years ago.

Q. You want me you want that answer that side outside the presence of everyone else, is that it?

A. Yes.

Q. Is it something you think would keep you from being fair and impartial in this case?

A. No.

Q. All right. I will move on then.

Do you have any close friends or family members that are police officers, attorneys, or judges?

A. No.

Q. You have heard me discuss the defendant's right to remain silent. Would you be able to follow the law as I have stated it?

A. Yes.

Q. If the State were to meet its burden and they proved the defendant guilty beyond a reasonable doubt, would you sign a guilty verdict form?

A. Yes.

Q. On the other hand if they failed to meet that burden, would you sign a not guilty verdict form?

A. Yes.

Q. Is there anything we have not talked about that you feel would keep you from being fair and impartial?

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A. No.

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ALMA MINEFE, called as a prospective juror herein, was examined and testified as follows:

DIRECT EXAMINATION BY THE COURT:

Q. Miss Minefe, you live on the southside of Chicago?

A. Yes.

Q. What do you do for a living?

A. Sales associate.

Q. And for a clothing store?

A. Yes.

Q. And how long have you been doing that, ma'am?

A. I have been at that store for about five years now.

Q. Okay. And I take it before that you were in school?

A. Oh, yeah. I was sales associate and going to school.

Q. You were going to school and doing this thing?

A. At a different location.

Q. Okay. And are you married, ma'am?

A. No.

Q. And do you have any children?

A. No.

Q. Have you ever served on a jury before?

A. No.

Q. Have you ever been an accused, a complainant, or a witness in a criminal case?

A. I was a complainant.

Q. And what type of complaint did you make out?

A. I was sexually harassed.

Q. And how long ago was that?

A. 11 years ago.

Q. Was someone arrested in that case?

A. No.

Q. Is there anything about that experience that would keep you from being fair and impartial in this case?

A. No.

Q. All right. Other than what you've just told

me about, have you been the victim of any other crimes?

A. No.

Q. Has an immediate family or very close friend ever been the victim of a crime?

A. No.

Q. Do you have any close friends or family members that are police officers, attorneys, or judges?

A. No.

Q. You have heard me discuss the defendant's right to remain silent. Would you be able to follow the law as I have stated it?

A. Yes.

Q. If the State were to meet its burden and they proved this defendant guilty beyond a reasonable doubt, would you sign a guilty verdict form?

A. Yes.

Q. On the other hand, if they failed to meet that burden, would you sign a not guilty form?

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A. Yes .

Q. Is there anything we have not discussed that you feel would keep you from being fair and impartial?

A. No.

Q. Thank you, ma'am.

LANCE TYSON, called as a prospective juror herein, was examined and testified as follows:

DIRECT EXAMINATION BY THE COURT:

Q. Mr. Tyson, you live on the southwest side of Chicago, sir?

A. Yes.

Q. What do you do for an living?

A. Attorney.

Q. What's the name of your law firm?

A. Gutack, Rock.

Q. And do you practice criminal law?

A. Public finance.

Q. Does anybody in your law firm practice criminal law?

A. No.

Q. Do you feel –

A. Well, not in this office. In the Chicago office.

Q. Okay. But do you ever get involved in those cases?

A. No .

Q. Do you feel there's anything about your position as an attorney that would keep you from being fair and impartial in this case?

A. No.

Q. I don't know if I asked you this. How long have you been a lawyer?

A. Five years.

Q. And you are single. Do you have any children?

A. No.

Q. Have you ever served on a jury before?

A. No.

Q. Have you ever been an accused, complainant, or a witness in a criminal case?

A. Accused.

Q. What have you been accused of?

A. Speeding. Speeding tickets.

Q. Did you have to go to traffic court on those?

A. Yes.

Q. Anything about that experience that would keep you from being fair and impartial?

A. No.

Q. Have you ever been the victim of a crime?

A. No.

Q. Has an immediate family member or close friend ever been the victim of a crime?

A. Yeah.

Q. Who would that be, sir?

A. My grandmother.

Q. What type of crime?

A. She was – she had her house broken into.

Q. How long ago would you say that was?

A. Maybe like 15 years ago.

Q. Do you know if anybody was arrested in that

case?

A. I don't believe so.

Q. Were you in any way a witness in that case?

A. No.

Q. Is there anything that happened to your grandmother keep you from being fair and impartial?

A. No.

Q. All right. Obviously you know quite a few attorneys. Do you have any close friends or family members that are police officers or judges?

A. Judges.

Q. And are they here in Cook County?

A. Yeah.

Q. Are they family members or friends?

A. Friends.

Q. Do any of them preside over criminal cases?

A. Civil.

Q. Civil cases. Okay. With regard to the attorneys that you are in contact with if they are

either very close friends or family members, do any of them practice criminal law?

A. No.

Q. Sir, would you be able to follow the law with regard to the defendant's right to remain silent as I have stated it?

A. Yes .

Q. If the State were to meet its burden and they proved the defendant guilty beyond a reasonable doubt, would you sign a guilty verdict form?

A. Yes.

Q. On the other hand, if they failed to meet that burden, would you sign a not guilty verdict form?

A. Yes.

Q. Is there anything that we have not talk about that you feel would keep you from being fair and impartial?

A. No.

Q. Thank you, sir.

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DOROTHY GANDY, called as a prospective juror herein, was examined and testified as follows:

DIRECT EXAMINATION BY THE COURT:

Q. Miss Gandy, you live on the southside of Chicago, ma'am?

A. Yes.

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Q. What do you do for a living?

A. Receptionist.

Q. How long have you been doing that?

A. Two years.

Q. And what did you do before that, ma'am?

A. Hairstylist.

Q. For how long were you in that field?

A. Forever. Maybe about 25 years.

Q. Okay. And are you married, ma'am, or have a domestic partner?

A. No.

Q. And you have three children, 35, 26 and 22, can you tell us what they do for a living, if they are in school, starting with the oldest?

A. Yes. He works for an advertising agency and the 26 year old is – he's doing some modeling.

Q. The youngest?

A. My daughter is she's working for a restaurant and going to school.

Q. All right. And have you ever served on a jury before?

A. No.

Q. Have you ever been an accused, complainant, or a witness in a criminal case?

A. No.

Q. Have you ever been the victim of a crime?

A. Yes.

Q. And when was that?

A. Probably about six years ago.

Q. And what type of crime was that?

A. Robbery.

Q. And was anybody arrested in that case?

A. No.

Q. When you say robbery, you mean that was something on the street?

A. Yes. Well, actually from the car.

Q. From your car?

A. Yes.

Q. Someone came up to you in your

A. Yes.

Q. Was that person armed with a weapon?

A. No.

Q. All right. Is there anything about that experience that you feel would keep you from being fair and impartial in this case?

A. No.

Q. Has an immediate family member or close friend ever been the victim of a crime?

A. Yes.

Q. Who would that be, ma'am?

A. My stepfather was stabbed and killed.

Q. When was that?

A. About five years ago.

Q. Was anybody arrested in that case?

A. No.

Q. Were you in any way a witness to that case?

A. No.

Q. Is that here in Chicago?

A. Yes.

Q. Is there anything about what happened to your stepfather that would keep you from being fair and impartial in this case?

A. No.

Q. You also circled you have been party to a lawsuit?

A. Yes. Car accident.

Q. And when was that?

A. Probably about six or seven years ago.

Q. Is that case been resolved?

A. Yes.

Q. Ma'am, do you have any close friends or family members that are police officers, attorneys, or judges?

A. Yes.

Q. Which is it?

A. Police officer, correctional officer.

Q. And is that a friend or family member?

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A. It is my daughter-in-law.

Q. And she is a correctional officer?

A. Yes.

Q. When you say -- does she work for the county or state or do you know?

A. County.

Q. Where does she work, do you know here?

A. Yes.

Q. How often do you see this daughter-in-law?

A. Pretty often.

Q. Once a week or more or less?

A. Every couple of weeks.

Q. Every couple of weeks. Do you talk to her about her work?

A. No.

Q. Do you feel there is anything about that relationship that would keep you from being fair and impartial in this case?

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A. No.

Q. From reading the witness list, I'm going to make an educated guess that some police officers will be testifying in this case. It is the law that you must Judge the testimony of a police officer as you would Judge any other witness. Would you be able to follow that law?

A. Yes.

Q. If the State were to meet its burden and they proved the defendant guilty beyond a reasonable doubt, would you sign a guilty verdict form?

A. Yes.

Q. On the other hand, if they failed to meet that burden would you sign a not guilty verdict form?

A. Yes.

Q. Is there anything that we have not talked about that you feel would keep you from being fair and impartial?

A. No.

Q. Thank you, ma'am

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THE COURT: Defense has no other causes. I will give the first panel to the State.

Mr. Rolwing, Miss Cooley, Mr. Palasz, and Miss Minefe.

MR. McCORMICK: Judge, Miss Cooley.

THE COURT: She is number two.

MR. McCORMICK: Right.

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THE COURT: All right. Then Lance Tyson is next.

MR. McCORMICK: Right. We will excuse Mr. Tyson, Judge.

THE COURT: State excuses Mr. Tyson. Then there's Miss Freels. Catherine Freels.

MR. McCORMICK: We accept that panel, Judge.

THE COURT: Mr. Fulton, this is the panel of Rolwing, Palasz, Minefe, and Freels.

MR. FULTON: Judge, we bumped Roat for cause?

THE COURT: Yes, we did.

MR. FULTON: Okay. All right, Judge.

Initially what I do is state for the record my client is black and Miss Cooley and Mr. Tyson are black and we could state that there don't appear to be any race neutral reasons that for bumping those individuals.

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We request the State give reasons for bumping both of them.

THE COURT: Well, that's not the standard.

MR. FULTON: Well, Judge, I'm establishing my prima facia case.

THE COURT: How are you doing that?

MR. FULTON: There's nothing I've heard that gives any reason why these people would be bumped and their black and my client is black.

THE COURT: But again my understanding is there's got to be a showing of a systematic exclusion of – well, I guess you are alleging African Americans.

MR. FULTON: I've also got to make a record, Judge. If we get to the end of this three hours from now and I want to start referring to earlier people that were bumped.

THE COURT: What I'm saying is these are preemptory challenges. You don't give reasons for

preemptory challenges.

If your argument is that the State has systematically excluded African Americans because of your client's race, you have to show me how that's done.

Isn't Miss Minefe African American?

MR. SWART: She is.

MR. FULTON: Again, Judge, they should indicate that for the report. What I'm saying is they bumped two people. The first two that are gone are black people. I'm stating that for the record.

THE COURT: Okay. And you are making a Batson motion?

MR. FULTON: Okay.

THE COURT: They don't give reasons until I say that you have made a prima facia case of systematic exclusion.

So the panel that they have tendered to you contains one African American. The complaining witness in this case, what race is he?

MR. McCORMICK: He is African American as well as the witnesses.

THE COURT: And all the witnesses?

MR. McCORMICK: Well, the other witness is Arab American.

THE COURT: I'm going to deny your motion.

Here is your panel.

MR. FULTON: All right, Judge. Mr. Rolwing we are going to excuse. And Mr. Palasz.

THE COURT: Anyone else?

MR. McCORMICK: No, Judge.

MR. FULTON: No, Judge.

MR. McCORMICK: Both of these people are Caucasians.

THE COURT: They are both male whites. Are you making a motion?

MR. McCORMICK: No, Judge, not at this time.

THE COURT: All right. All right

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The next one is Dorothy Gandy and James McVicker to the defense.

MR. FULTON: We are fine with those two.

THE COURT: Are you accepting that panel of four?

MR. FULTON: Yes.

THE COURT: All right.

MR. McCORMICK: Judge, we have no problem with those. We accept that panel as well, Your Honor.

THE COURT: All right. All right. So the record should reflect that the first panel is Minefe, Freels, Gandy, and McVicker. I believe there's four jurors, two are African American. Okay. That's your first panel.

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